

THE STATE OF NEW HAMPSHIRE

STRAFFORD COUNTY

SUPERIOR COURT

Great Bridge Properties, LLC

v.

Town of Ossipee

Docket No.: 04-E-110

FINDINGS, RULINGS, AND ORDERS

The plaintiff, Great Bridge Properties, LLC (“Great Bridge”), is a development company that exclusively develops multifamily affordable housing. The defendant, the Town of Ossipee (“the Town”), is a town in Carroll County, New Hampshire. The Town has a zoning ordinance that provides that new multifamily housing may only be developed in its Village District, and such new development is limited to existing structures that are currently, or are capable of being, tied into the Town sewer system. Multifamily housing projects must be limited to four or fewer units per structure on a particular lot. Great Bridge, after attempting to obtain variances to construct a housing development with six four-unit buildings in the Town’s Village District, brought this action, claiming the Town’s zoning ordinances are unconstitutionally restrictive and discriminatory based on family status. Great Bridge seeks a builder’s remedy, which would, in effect, allow them to construct the project as designed. Tammy and Michael Reed and Rhonda MacNeil, all of whom are low income residents of Ossipee (“the intervenors”), intervened in this case on behalf of Great Bridge.

The court held a preliminary hearing in this case on July 23, 2004 to determine the scope of the applicable region for purposes of analysis in this case. In an August 6, 2004 order, the court

determined that Carroll County was the appropriate region. The court held a bench trial on the substantive issues in this case on January 20 and 21, 2005. At the hearing, Great Bridge withdrew its discrimination based on family status claim, leaving the sole issue before the court the legality of the Town's zoning ordinance regarding multifamily housing. After review of the testimony at trial, the parties' arguments, and the applicable law, the court finds and rules as follows.

Great Bridge's proposed development ("the project") is a six building multifamily housing complex situated on a lot that is slightly larger than nine acres. The lot is at the intersection of Route 25 and Route 16-B in Ossipee. It is roughly 300 yards from Route 16, the principal State road through town. The lot has significant frontage on Route 16-B. The project's site plan develops only three and a half acres of the site, concentrating the development near the frontage on Route 16-B and leaving the remainder of the lot as open space. (See Pl.'s Ex. 12-B). The project is not in compliance with several of the Town zoning ordinances, however, and Great Bridge was denied its requests for variances.

Section 4.4 of the Town's zoning ordinance provides that in all of the Town's zoning districts there may be only one principal structure per lot. (Town Zoning Ordinance, Pl.'s Ex. 8). In defining residential uses, the zoning ordinance defines a multifamily dwelling as follows: "This shall apply only to those existing buildings which are or can be hooked into the Town's present sewer system, said building shall not exceed a total of four (4) residential units." (Id. at § 35.1). Multifamily housing is only permitted in the village and residential districts in the Town. (Id. at § 34.1).

In the past, Great Bridge, a for-profit company, has developed a fairly large number of affordable housing structures. For purposes of this order, the court will use the term "affordable housing" to include all of the concepts and terminology raised at the bench trial in this case, including "workforce housing" and "low- or moderate-income housing." Affordable housing encompasses the notion that people should traditionally spend around 30 to 35 percent of their

income on housing and maintenance of housing. Most recently, Great Bridge completed a 3 building, 90-unit structure in Rochester, New Hampshire. Great Bridge also constructed a 1 building, 30-unit project in Dover and a 7 building, 50-unit structure in Littleton. The least dense development project completed by Great Bridge is a 3 building, 12-unit project for the Portsmouth Housing Authority.

Two programs exist to provide incentives for and to enable developers to construct affordable housing developments. The federal Low Income Tax Credit (“LITC”) program enables developers to entice investors to invest in, and to receive tax credits for, affordable housing projects. The federal Department of Housing and Urban Development defines low-income residents as families or individuals making 50 percent or less of the median area income. Moderate income is defined as families or individuals who make 60 percent or less of the median area income. The Great Bridge project is intended to be half low-income and half moderate-income housing. The LITC program limits rents to 30 percent of the maximum income for the unit types. The LITC has an absolute threshold of only allowing those who earn 60 percent or less than the median area income, or those who are low- to moderate-income, to rent the units in LITC projects. The LITC program has certain requirements that are included as deed restrictions when the developer uses LITC funds or credits to purchase property.

The federal HOME program is a soft debt or grant program used to fill gaps in the LITC program funding. The HOME program is a federal block grant providing capital for low-income housing. The LITC and HOME programs are technically different and are aimed at somewhat different populations. There is an additional program, the Community Development Block Grant, that aids in the development of affordable housing. However, developers cannot apply for the grant, only cities and municipalities may apply. Therefore, the Community Development Block Grant plays a much smaller role in the development of affordable housing.

William Caselden, a Great Bridge principal, testified that the LITC and HOME programs finance roughly 90 percent of the affordable housing constructed in the country today. He said the days of Section 8 housing, where a tenant receives a voucher for his or her rent, are largely gone. Section 8 is a federally funded housing program that targets very low income households to enable them to bridge the gap between what they can afford and what rents are in the area. Under the Section 8 program, tenants apply to the local housing authority and receive a voucher. Caselden said some towns may give developers bonuses if they set aside units in a traditional development project for low-income tenants, and this enables private developers to assist in developing affordable housing without government funding. However, Caselden said this kind of development is very rare in New Hampshire.

The federal programs described above are administered in New Hampshire by the New Hampshire Housing Finance Authority (“NHHFA”). The NHHFA seeks to put the poorest people in the state in the housing it approves funding for. Chris Miller (“Miller”), the director of management and development at the NHHFA, stated that this is the organization’s goal because it cannot give money to every developer who asks for it. In administering the programs, the NHHFA receives applications for funding or tax credits at twelve pre-established times during the year. The NHHFA then evaluates the applications and gives credits or points based on pre-set criteria. The NHHFA gives credits or points to those applicants who target lower incomes or bring Section 8 or other subsidies to the table. Applicants generally learn within four to six weeks if their projects received credits. The NHHFA also makes threshold findings regarding flaws in the plans, such as if the project requires variances from local zoning ordinances. Applicants can reserve the credits they are awarded with the expectation that they will demonstrate significant progress within 120 days. The stated goal of the NHHFA is to bring resources to those households with the greatest need.

The NHHFA is the only administrator of Section 8 programs in Carroll County. There are 228 people in Carroll County on the Section 8 waiting list, and 59 of those people are from Ossipee.

39 households in Ossipee already receive Section 8 assistance. Under Section 8, HUD establishes a fair market rent by county and will only pay that amount. Tenants receiving Section 8 assistance cannot pay more than 40 percent of their income on rent.

In choosing the site for its project, Great Bridge was encouraged to look in the Ossipee region by a local community action program that runs the local Head Start program. Great Bridge generally looks for sites that are located on town water and sewer lines because it is hard to construct dense developments on septic systems. Caselden asserts that unlike other developers, Great Bridge looks at sites and surrounding communities and attempts to design a project that is suitable for the community. Specifically, Caselden said Great Bridge attempts to meet the community's needs by varying the types of units and income levels within the project.

Caselden said in the Ossipee project, Great Bridge attempted to comply with the zoning requirements of 4 units per building, which made the project almost unfinanceable. He also said Great Bridge designed the buildings to look as much like single family homes as possible. (See Pl.'s Ex. 12-C). Great Bridge chose the location at the intersection of Route 16-B and 25 because it was close to Route 16, close to shopping, and would not require the project's residents to go through the center of Town to access main roads, which would alleviate traffic concerns. Great Bridge left a great deal of green space on the property to make the project assimilate into the surrounding community, to impact as few abutters as possible, and to introduce some construction efficiencies to the project, including minimizing the road length inside the project. Caselden also testified Great Bridge has no plans to develop the green space on the lot, and offered the ZBA a conservation easement over the undeveloped portions of the lot. Each building within the project has one one-bedroom apartment, two two-bedroom apartments, and one three-bedroom apartment. Great Bridge specifically designed the project in that manner so that it could address a wide variety of household makeups and types. The inclusion of two- and three-bedroom apartments serves as a bonus in the NHHFA application process because credits or points are awarded for providing units for families.

Caselden said Great Bridge included the one-bedroom apartments because it suited the needs of the community.

Caselden said the intent of the development would be to permit people from any location to move into the property. He stated that fair housing law requirements preclude either Great Bridge or the NHHFA from earmarking the units for Ossipee residents only.

The rent in the units would be set by the LTC requirement. Under the program, the maximum rent is 30 percent of the maximum income for each unit type. Renters can pay up to 40 percent of their income on rent, but the rent is set at the maximum allowable income for each unit type. The rent would not be adjusted for each tenant, but would instead be set based on the percentages set forth by the LTC program for each of the income groups. Rent would include heat, hot water, taxes and insurance. The tenants would be responsible for the costs of electricity and additional utilities. Caselden said that the NHHFA, as the underwriter, requires projects to be financially viable receiving only 90 percent of the maximum rent, so Great Bridge will likely be able to rent some of the units below the maximum rent. Caselden asserts this will allow Great Bridge to reach even lower-income households with housing needs. Great Bridge's intent, in keeping with the LTC funding requirements, is to rent half of the units to moderate-income residents and half to low-income residents, consistent with the HUD definitions set forth above.

Great Bridge intended to apply to the NHHFA in February 2003, but due to this protracted zoning conflict and litigation, has not yet done so. Great Bridge intends to apply in February 2005. Great Bridge has not yet purchased the lot on which it intends to build the project. Instead, Great Bridge has paid a monthly fee to maintain its option to purchase the lot.

After being denied in its requests for variances from the Town Zoning Board of Adjustment ("ZBA"), Caselden said Great Bridge explored the idea of constructing duplexes instead of multifamily housing. Caselden said that the four-unit structures were already stretching the financial feasibility of the project, and that there was no way to make the project work with

duplexes. Caselden testified the LITC program is the main engine for low-income housing development today, and if the project is not financially feasible, it is unlikely to get funding under the LITC program. According to Caselden, agencies that administer the LITC program always analyze the project in the context of the funding, including the budget. Indeed, Miller testified the NHHFA has never funded a duplex LITC development project. The NHHFA funded the purchase of one duplex building project, where a non-profit organization was acquiring an existing building. Miller asserted that the duplex purchase was the only federally-funded duplex project for low-income housing that he knows of. Miller said the financial aspect of a low-income duplex project never makes sense because duplexes are a fundamentally less efficient construction project.

Caselden asserted duplexes would be less financially efficient because the road length inside the project would have to be doubled, the utilities would have to be run to two times as many buildings, there would be increased curb cut requirements for driveways, and other expenses would double, including furnaces, hot water heaters, and oil and gas lines. Caselden also said there would be increased management inefficiencies in a duplex development, including increased plowing, landscaping, and trash removal requirements. Caselden said that these increased costs would place the project over the per-unit cost caps in place for the funding programs. (See, e.g., 2005 New Hampshire Qualified Allocation Plan, Intervenor's Ex. 8). Miller testified that if a project exceeds these caps, the project will be rejected unless the developer has an external funding source. Caselden said similar problems or inefficiencies arise in single family manufactured housing development. According to Caselden, as the development becomes less dense, it also becomes less financially efficient. Additionally, Caselden testified if a developer were to develop duplexes or manufactured housing, the one-bedroom apartments would be eliminated.

Caselden also stated that Great Bridge never considered doing a cluster development and that Great Bridge only briefly considered rehabilitating existing structures into four-unit buildings. Caselden testified that to renovate buildings with enough volume to qualify for LITC funding is

generally impossible. Miller testified that most projects in New Hampshire are smaller in scale because most communities and towns in the state cannot support a 150-unit structure.

Russell Thibeault, the president of Applied Economic Research, testified regarding the housing needs in the Town and Carroll County. (See Ossipee Housing Needs Assessment, Pl.'s Ex. 13). Thibeault's report is based predominantly upon information and statistics contained in the decennial census. Thibeault used the census as his data source because it provides detailed information regarding household characteristics. Thibeault conceded that intervening factors or events may alter the makeup of the County and the Town and make his projections inaccurate, but stressed that the census data is the best available data upon which to base a housing needs analysis. In the 1990s, both the Town and the County experienced growth at two times the rate of the State's growth, and both the Town and the County are expected to continue to have increased populations. There is a relatively low vacancy rate in rental properties in the County currently, and because the region's population is expanding, it will need expanded housing, or new construction, to accommodate the increased housing need. Specifically, a five percent vacancy rate is the industry norm, and the County dropped below that rate in 1997. Thibeault created a chart that demonstrates that once the rental vacancy rates dropped below five percent, the rents in the County increased immensely. (See id. at 5).

Most of the job growth in the County is in retail or sales, which are lower wage sectors and tend to be part-time work with few benefits. Thibeault's comparison of incomes, rents, and prices of housing from 1999 to 2003 led him to the conclusion that housing is now less affordable. Thibeault found that those with the lowest incomes are those who spend the largest percentage of their income on rent. Thibeault made what he called a conservative projection of the County's housing needs, and determined the county needs 2000 more rental units by the year 2010. He found that households with a housing need, which he defined as those households that spend more than 35 percent or more of their income on housing, would grow by 500 households by 2010.

Thibeault found that housing need is a significant problem in the County. The County is adding low-income jobs with an economy that favors low-wage jobs and a market that favors high-priced housing. Thibeault found the same problems for Ossipee. He discovered 79 low-income households in Ossipee paying more than 35 percent of their income on housing, and 14 moderate-income households doing the same. (See Ossipee Housing Needs Assessment, Pl.'s Ex. 13, at 9). In short, Thibeault found the gross rent, which includes utilities, in Ossipee to be well in excess of what low-income families can meet. Thibeault testified the problem was due in part to no new construction of multifamily housing units in Ossipee since 1991 and a boom in low-wage jobs in the 1990s.

Thibeault found that the County as a whole has under performed in providing affordable housing for low- and moderate- income families. Using a mathematical analysis based on the decennial census data, Thibeault determined that the Town's share of the County's housing need is nine percent. (See Ossipee Housing Needs Assessment, Pl.'s Ex. 15, at 15). The Town's housing configuration is primarily single family housing. (Id. at 11). The Town only has 4.3 percent of the County's multifamily housing. Thibeault concluded that the Town would need 179 more multifamily housing units by 2010 to meet both the need and its fair share of the burden of providing affordable housing for the County.

Miller testified to an annual rent survey conducted by the NHHFA. The 2004 survey found the median gross rent for a two-bedroom unit in the County was \$811. The most wealthy low-income household in Carroll County has an income of \$32,400. Based on the survey, only 7.3 percent of the two-bedroom units in Carroll County would be affordable to a low-income family or household. In the same survey, the NHHFA determined the vacancy rate for rental units in the County in 2004 was 2.9 percent, well below the 5 percent industry standard described by Thibeault and agreed with by Miller. Miller concluded that there is a dire need for affordable housing for low-income households in the County.

Thibeault said that the Town's zoning ordinances put a burden on both the Town and the County. Low-income households in the Town reside in substandard housing and pay more than they can afford to do so. This translates to other problems, such as the household members' being unable to maintain automobiles. Miller testified that he has never seen an ordinance limiting multifamily housing to existing structures other than the Town's ordinance. Miller said there was no valid reason for such an ordinance, and it was clearly an effort to minimize the construction of rental housing.

Caselden also testified to general difficulties with manufactured or mobile homes and low- and moderate-income families. First, the LITC program is not generally used for manufactured housing parks. Second, manufactured housing units are generally for sale, as opposed to being rental units. As such, they serve a population that cannot afford to own a single family home, but are still not affordable to very low income families. In addition to buying the unit, the resident must also pay rent for the pad upon which the home is located and for utilities.

Likewise, Thibeault found manufactured housing ineffective for meeting low-income housing needs. He also determined that although the Town has 20 percent of the County's manufactured or mobile homes, this percentage is a bit of an overstatement because many of them are second homes or vacation homes and are therefore not used as primary residences. Additionally, Thibeault testified that buying and moving into manufactured homes is not an option for low-income people. The down payment required for manufactured homes is larger than for other properties, and stable credit, something many low-income people do not have, is required to purchase a unit.

Miller stated the NHHFA does not generally deal with manufactured housing parks in providing affordable housing. The NHHFA has, however, helped with cooperative tenant buy-outs of parks in the past. Additionally, the NHHFA's single family mortgage program can assist a low-income household in the purchase of an existing manufactured housing unit, but it must be located

in a cooperative park and it is still usually out of reach for low-income households. Miller cited many reasons why manufactured housing was not a good solution for affordable housing. Specifically, Miller stated the pad rent and the cost of buying the unit place the option outside of the reach of most low-income families. If the households were able to afford the units, placing low-income households in ownership roles is risky because as owners, they then have very limited resources to deal with the financial demands of home ownership. Additionally, Miller testified that the financing plans for manufactured housing units are more comparable to commodity financing than real estate financing, and requires more money in a shorter amount of time and larger down payments than a home mortgage would require. As such, according to Miller, manufactured housing units are more geared toward and appropriate for the upper tier of moderate-income households.

The single family home mortgage program offered by the NHHFA is referred to as the “two under” program. It allows those who make 60 percent or less than the median area income secure a mortgage at two percent less than the conventional mortgage rate for three years, then one percent less for the following year. It is a subsidy to help buy down the mortgage and enable lower income households purchase homes. This program is only available to purchase existing manufactured homes in cooperative parks or single family homes.

Mark McConkey, the ZBA chairman, owns two manufactured housing parks in the County. He testified that his park in the Town, Skandia Estates, has a more than 10 percent vacancy rate. He testified that his park in Tamworth, Skandia North, has a less than five percent vacancy rate. There is also another manufactured housing park in the Town, the Sandy Ridge Campground, that is being purchased by a tenant cooperative and has been an ongoing source of problems to the Town for 15 to 20 years because of water and sewer problems.

The rental for each of the 115 pads in Skandia Estates is \$275 per month. The vast majority of the units in the park are owner-occupied, but some individuals are renting. The park’s population

is about one third families, one third elderly residents, and one third seasonal or recreational use. The units in the park sell for \$30 thousand to \$50 thousand, though one sold for \$71 thousand recently. Skandia North has 55 units, which usually sell for between \$50 thousand and \$60 thousand. Apparently, part of the reason McConkey purchased the second park in Tamworth was due to a lack of available land in the Town and the Town's zoning restrictions on the development of new manufactured housing parks.

McConkey also testified about a draft update for the Town's Master Plan that was prepared by a member of the planning board. The update states, "Businesses have difficulty hiring and retaining employees because of the housing shortage. One of the areas' [sic] largest employers, the Lakeview NeuroRehabilitation Center, finds the lack of workforce housing to be a barrier to business growth." (Intervenor's Ex. 9 at 4). McConkey said this had not been approved by the planning board.

McConkey originally voted in favor of granting Great Bridge the variances, but then changed his mind. At the hearing, he stated:

I will say that I have joined this Board as many other people did because they disagreed with some things in here and thought that reasonable minds should be present for further interpretation. I will also say that it is my thought that when this ordinance was written it was known at that time that this was exclusionary. It was written exactly for that reason. It is my opinion but that it is very – also clear with the people in town voted for that knowing it, maybe not knowing that in its entirety at the time. I believe the spirit of this ordinance was to deny the opportunity for multi-family housing to go forward in this town. I believe that's the intent of the ordinance whether it is right or it is wrong.

(Intervenor's Ex. 9-ID, transcript of statement played at trial).

McConkey testified this statement was made in the heat of passion, but testified at the bench trial that he would vote against the variances again. McConkey said the ZBA was repeatedly told the project was not subsidized housing, but that he believes it is, and he wants to take care of the residents of the Town. He testified he sees the LTC program as saying the best way to get money is to make the worst project in the worst location and help the investors earn money. He said Great

Bridge is attempting to force low-income housing on the Town to benefit the corporation. Nevertheless, McConkey conceded that residents would need to work to pay the rents and many people in the Town make the incomes that would qualify them as low- or moderate-income.

One of the variances Great Bridge sought was from the Town zoning ordinance allowing only one principal structure per lot. Caselden testified that although there was sufficient space to configure the development so that there were six separate lots with only one building per lot (see Def.'s Ex. B), that was not consistent with Great Bridge's plan and would push the development further into the lot, making it less financially efficient. Moreover, the subdivision process costs a great deal of money because engineers and planners must be hired. Caselden conceded there was no LITC program mandate that the development be on one lot.

Miller stated that there was a great impact on the cost efficiency of the project if it were to be done in six lots instead of one. Specifically, the transaction costs would increase. NHHFA places a great deal of restrictions on the use of properties funded through it, and many of those are written into the deeds of the projects. Additionally, the financial paperwork is expensive and time consuming. Breaking the project into six separate lots would increase the cost of these processes, hindering the project's financial efficiency.

There was also extensive testimony from both Caselden and McConkey regarding whether Great Bridge misrepresented the project when it went before the ZBA. Caselden admitted Great Bridge called the project "workforce housing," but stated he also extensively described the LITC program and responded to ZBA members' and the public's fear that the project was a public housing project or subsidized housing. Caselden explained he used the phrase "workforce housing" because the residents will need to work to be able to afford to pay the rent. They will not receive federal assistance in paying their rent. Miller stated there is little practical difference between the terms because they all consider the degree the government is investing in the project. Any government investment is, in essence, a subsidy directed at the objective of producing the

development of affordable housing for low- and moderate-income households. Miller said the “workforce” moniker redirects the focus of opponents to low-income housing, but the workforce that would be housed in this project would qualify as low-income. The typical tax credit project assumes the tenant’s ability to pay rent without a subsidy, and the “workforce” label helps communicate that distinction.

McConkey testified the board members felt like they were being deceived and that Caselden’s semantics convinced them the project was merely subsidized housing. McConkey stated that since this case’s inception, two multifamily housing projects have begun in the Town. One person purchased three lots and is constructing single building multifamily housing with a variance. Another person bought existing buildings and is renovating them into three or more apartments. That person may also build two to three more duplexes. McConkey stated, however, that the ZBA has concerns about low-income housing. He said low-income housing would present problems for the Town because it would not necessarily help Town residents and would invite people not from New Hampshire to move into the community.

As part of the builder’s remedy it seeks in this case, Great Bridge seeks approval from the court to bypass the Town planning board. Caselden testified the site was traditionally laid out, and that it took many planning board concerns into account. For instance, each unit has two parking spaces, setback requirements are complied with, and swales were planned to handle runoff. Additionally, Great Bridge intends to screen the property from abutters and landscape around the buildings. Caselden also testified that sewage would be properly handled because the property is connected to the Town water and sewer line and there are no wetlands disturbed by the development.

The Town planning board has not seen any plans for the development. The Town has not been able to mandate testing for environmental concerns, and Great Bridge has not hired any environmental experts. Miller testified that conditional funding credits could be given to a project

that was awaiting planning board approval, and that such a delay would not adversely affect a project if it were cleared up in the 120 day window.

Municipal legislative bodies have the power to adopt zoning ordinances “for the purpose of promoting the health, safety, or the general welfare of the community[.]” RSA 674:14 (1996). In Britton v. Town of Chester, 134 N.H. 434 (1991), the New Hampshire Supreme Court interpreted this statute to mean the “community” encompassed a region broader than the municipality itself. 134 N.H. at 441. The Supreme Court reasoned in Britton that zoning ordinances that effectively exclude “persons of low- or moderate-income from the zoning municipality” fly “in the face of the general welfare provision of RSA 674:16 and [are], therefore, at odds with the statute upon which” they are grounded. Id. at 440-441. Accordingly, zoning ordinances that operate to exclude lower income residents from living in a municipality are not promulgated to promote the welfare of the community, and are therefore not a valid exercise of the power delegated by the State to municipalities. See id.

Municipalities are not isolated enclaves, far removed from the concerns of the area in which they are situated. As subdivisions of the State, they do not exist solely to serve their own residents, and their regulations should promote the general welfare, both within and without their boundaries.

Id. at 441.

In this case, Great Bridge and the intervenors have demonstrated the Town is not promoting the general welfare through its zoning ordinances. Specifically, the Town’s zoning ordinances effectively preclude the meaningful development of multifamily housing, which Thibeault demonstrated is the only economically feasible option for the gross majority of low- or moderate-income households in the County. The process of renovating existing structures, which is permitted under the ordinance, is an almost cost-prohibitive practice because the process is so expensive that it likely will not receive LITC funding from the NHHFA or the costs will need to be passed onto the eventual renters of the units within the property.

There is no question in this judge's mind, based on McConkey's testimony both in court and at the ZBA hearing on Great Bridge's requested variances, that the Town, through its zoning ordinance, seeks to exclude low-income families from living within its borders. McConkey stated that such exclusion was the spirit of the ordinance. Thibeault explained what he believed the Town's fair share of low-income households should be, and demonstrated the Town has not fulfilled its obligations in that arena. Britton is clear that "towns may not refuse to confront the future by building a moat around themselves and pulling up the drawbridge." 134 N.H. at 440 (quotation and citation omitted). Through its zoning ordinance, the Town has attempted to do so in this case. By making it economically infeasible for low-income households to live in the Town, and by enacting zoning ordinances that preclude the development of affordable housing, the Town has created a moat to keep out low-income households from both the County and other regions. Such a scheme is clearly illegal.

In an earlier order on Great Bridge's motion for summary judgment, the court stated it would seek to evaluate the effect of manufactured housing parks on low-income housing. Based on the testimony presented at trial, the court finds that manufactured housing is not an adequate substitute for affordable housing. The purchase price of manufactured housing units are in many cases prohibitively high. Additionally, the financing schemes for the units is often outside the reach of low- and moderate-income households. Moreover, even if the households were able to secure financing and purchase a unit, the pad rental in manufactured housing parks and the costs associated with home ownership are often too high for low- and moderate-income families. Although the Town has a high percentage of the County's manufactured housing, the court finds it does not satisfy the Town's burden of providing a proportionate share of affordable housing for low- and moderate-income households in the County.

Accordingly, the Court finds the interaction of sections 4.4, 34.1, and 35.1 of the Town's zoning ordinance operate to effectively preclude low- and moderate-income households from

residing in the Town. As a result, the Town does not bear its proportionate share of affordable housing in the County. As such, the ordinances do not promote the general welfare and are in violation of RSA 674:16.

Having entered this finding, the court must next consider an appropriate remedy for Great Bridge. Great Bridge seeks a “builder’s remedy,” which would permit it to complete its project as proposed. Britton, 134 N.H. at 442. The court finds this is not completely appropriate in this case. The project is deemed to have fulfilled all zoning requirements because the Town’s zoning ordinances pertaining to this kind of development are illegal. Nevertheless, the ZBA is not the only body which must approve developments in the Town.

Great Bridge has not submitted any plans to the Town Planning Board. The testimony at trial indicated the Planning Board would review the site plan for environmental impacts and other concerns, including appropriate lighting, shielding abutters, and road grades. Although Caselden testified he did not believe the project would receive a warm reception at the Planning Board, the court does not find it appropriate to allow Great Bridge to bypass this step in the development process. Accordingly, Great Bridge must submit its site plan for the project to the Town Planning Board. In light of the history of this case, the court finds and rules that the Town Planning Board must then review and vote on the plan within 45 days or two meeting cycles, whichever comes first. The court retains jurisdiction over this case, and if the Planning Board does not act within the appropriate time, or Great Bridge believes the Planning Board has acted unreasonably, Great Bridge may seek further review of the Planning Board’s decision. Notwithstanding the time lines in RSA 677:15, the court would review the Planning Board’s decision within 30 days.

Additionally, the court recognizes that if it were to declare the disputed portions of the Town’s zoning ordinance void, the Town would be left with no zoning for the affected areas and the types of housing. Therefore, the court declares that sections 34.1, 35.1 and 4.4 are illegal as applied to multifamily housing, but allows them to remain in effect temporarily. The Town has 60 days to

adopt interim ordinances that will be in effect until the Town's population can vote on new ordinances. If no such action is taken within 60 days, the ordinances will be void.

The parties submitted requests for findings of fact and rulings of law. The requests are **GRANTED** to the extent they are consistent with this order and are otherwise **DENIED** or deemed irrelevant to the issues before the Court. See Geiss v. Bourassa, 140 N.H. 629, 632-33 (1996).

Accordingly, consistent with the above, Great Bridge's Petition of Appeal is **GRANTED** in part and **DENIED** in part.

So Ordered.

Feb. 7, 2005

Date

Bruce E. Mohl
Presiding Justice